United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6089

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES P. LEE, JR.,
Plaintiff-Appellant

v.

WILLIAM L. THORNTON, ETC., ET AL.,
Defendants-Appellees

RONALD RICH,
Plaintiff-Appellant

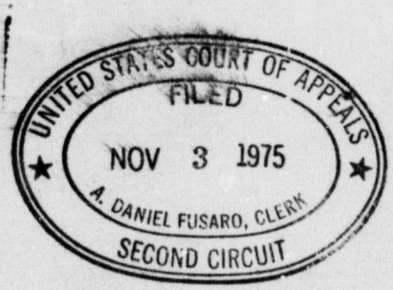
v.

WILLIAM L. THORNTON, ETC., ET AL.,
Defendants-Appellees

On Appeal from the United States District Court

for the District of Vermont

BRIEF OF PLAINTIFF-APPELLANT



JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
150 Cherry Street
P.O. Box 562
Burlington, Vermont 05401

Counsel for Plaintiff-
Appellant

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B. Does the seizure of a vehicle pursuant to 19 U.S.C. § 1594 as security for payment of a personal penalty assessed under 19 U.S.C. § 1460 for alleged violation of 19 U.S.C. § 1459 without a prior hearing deny due process of law to the owner of the vehicle?

C. Does the imposition of personal penalties under 19 U.S.C. § 1460 for alleged violation of 19 U.S.C. § 1459 without a hearing deny due process of law?

D. Are plaintiffs entitled to the return of mitigated and remitted penalties assessed against them by Defendants because the process of assessment denied plaintiffs due process of law?

II. STATEMENT OF THE CASE

A. Nature of the Case

This appeal involves two related actions, joined below in the United States District Court for the District of Vermont, relating to the constitutionality of certain provisions of the United States Customs laws governing the penalties imposed on persons who allegedly enter the United States without inspection or import contraband. The combined actions were originally heard by a three-judge district court, but after appeal to the United States Supreme Court, were dismissed by a single United States District Judge. From the order of dismissal, plaintiffs have appealed.

B. Course of Proceedings Below

Plaintiff, James Lee, brought his action in the United States District Court for the District of Vermont on November 24, 1971, alleging that his automobile had been unlawfully seized under the forfeiture provisions of the customs law, and that he had been improperly assessed with penalties for allegedly entering the United States without submitting to inspection and importing contraband into the United States. On October 31, 1972, plaintiff Rich filed a similar action alleging he was unlawfully assessed personal penalties, and his automobile seized, for failing to submit to inspection on entry into the United States. Both complaints alleged that the penalty and forfeiture provisions of the customs laws, as applied to them, denied them due process protections notably, a hearing prior to seizure and a post-seizure plenary hearing - and the specific protections of the criminally accused

under the fourth and sixth amendments to the United States Constitution.

The two cases were consolidated and heard by a Three-Judge District Court on March 6, 1973 on stipulated facts.[1/] On January 22, 1974, the court issued its opinion, upholding part of plaintiffs' claims and denying others. The order of the Court required: (1) immediate probable cause hearings by customs officials to determine whether there is probable cause to believe that seized property is subject to forfeiture for violation of customs laws or may be held as security for payment of money penalties; and (2) immediate hearings on mitigation or remission of forfeitures or personal penalties, or, alternatively, establishment of a bond amount for temporary return of seized property in light of the expected penalty assessment. See Lee Appendix at A-58, A-59, A-61; Lee v. Thornton, 370 F. Supp. 312, 321-23, (D. Vt. 1974). Although the three judge court required probable cause hearings and speedy decisions on remission or mitigation, the court rejected plaintiffs claim to a full, post-seizure hearing on whether plaintiff actually violated the customs laws. The court held that the judicial forfeiture process provided by 19 U.S.C. § 1608 afforded due process and rejected plaintiffs claim that the $250 bond requirement unconstitutionally deprived indigents of a hearing. The Court also rejected plaintiffs other claims about the procedural protections afforded by the post-seizure judicial forfeiture hearing. See Lee Appendix at A-59 through A-63.

1/ As discussed in more detail infra, the stipulation actually only set out the expected testimony of certain witnesses without resolving conflicts between them. See Amended Stipulation, Appendix, Lee v. Thornton [hereinafter Lee Appendix] at A-22; Amended Stipulation, Appendix, Rich v. Thornton, [hereinafter Rich Appendix] at A-14. Also, Affidavits were submitted. See Lee Appendix at A-14, A-19, A-43.

The three-judge court also rejected plaintiffs' claims for return of the money penalties they had paid, but remanded to a single-judge the question of consequential damages. An order implementing the opinion was issued on April 10, 1974. See Lee Appendix at A-73. Both plaintiffs subsequently withdrew their requests for consequential damages. See Lee Appendix at A-76.

On April 10, 1974, plaintiffs appealed to the United States Supreme Court. On July 3, 1974, plaintiffs filed their jurisdictional statement requesting the Supreme Court to review the decision below on three issues: (1) whether the bond prerequisite to a hearing on the grounds for forfeiture denies due process of law to indigents under the fifth amendment to the United States Constitution; (2) whether the placement of the burden of proof in forfeiture hearings on the individual denies due process of law under the fifth amendment; (3) whether the assessment of personal penalties for alleged violations of the customs laws without a hearing denies due process of law.

On February 20, 1975, in response to a motion by the Government, the Supreme Court vacated the decision below and remanded the case. The Court held that the jurisdictional ground chosen by the three-judge court, 28 U.S.C. § 1346(a)(2) (the Tucker Act), did not authorize injunctive or declaratory relief and, therefore, that the three-judge court was improperly convened. The case was remanded for consideration of other jurisdictional grounds asserted by plaintiffs.

On May 19, 1975, the three-judge court dissolved itself without hearing or opinion. See Lee Appendix at A-81. On

July 25, 1975, District Judge Albert W. Coffrin, again without hearing, issued an opinion and order dismissing p intiffs' complaints. See Lee Appendix at A-83. Judge Coffrin accepted plaintiffs alternative jurisdictional grounds but found, in light of the recent decision of the United States Supreme Court in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), that the procedural rights ordered in the original three-judge court decision were not required. The court reiterated the earlier holding that the bonding requirement of 19 U.S.C. § 1608 and the burden of proof placement were not invalid. The court also reiterated the earlier holding denying an order to return the monetary penalties plaintiffs had paid.

On August 26, 1975, plaintiffs appealed to this court from the opinion and order of July 25th.

C. Disposition of Court Below

The opinion and order of the three-judge district court, the United States Supreme Court, and District Judge Albert W. Coffrin are reproduced in the Lee Appendix A-47, A-78, A-83, respectively. The opinion of the Supreme Court is reported at 420 U.S. 139. The opinion of the three-judge court is reported at 370 F. Supp. 312.

D. Statement of Facts

1. Ronald Rich[2/]

Ronald Rich, a resident of Saint Albans, Vermont, was

2/The relevant facts in regard to Ronald Rich are contained in the Amended Stipulation, Rich Appendix at A-14 et seq.

stopped together with his wife and two children on October 27, 1971 by a border agent in the vicinity of Swanton, Vermont. They were accused of having entered the United States unlawfully on a road not containing a border check point. The border agent then directed plaintiff, Rich, to the Highgate Springs Customs and Immigration station, where his automobile was seized pursuant to 19 U.S.C. § 1459.

At the station, plaintiff Rich was advised that pursuant to 19 U.S.C. § 1460 he was liable for a statutory penalty of $1600 - $100 for himself and $500 for each of his passengers - for having entered the United States without inspection. He was further advised that he could file immediately for mitigation of the penalty under 19 U.S.C. § 1618. Plaintiff forthwith filed a mitigation request with the customs inspector on duty stating he had taken a wrong road by mistake.

The customs inspector acted by authorizing the release of the automobile on the posting of a $50 bond. The three-judge court surmised that this was a finding that plaintiff's automobile was worth $50. Plaintiff paid the deposit and left with his vehicle.

On January 6, 1972, plaintiff received notice of penalty incurred, signed by Defendant Thornton, demanding payment of $1600. On January 14, 1972, plaintiff received a letter from Defendant notifying him that the penalty was mitigated to $25 and that it would be deducted from the $50 deposit with the remainder returned.

Plaintiff was not afforded a hearing on whether he actually violated 19 U.S.C. § 1459, on the amount of his deposit, or on the merits of his petition for complete remission of the penalty.

2. James P. Lee[3/]

Plaintiff, James P. Lee, travelling with a friend and two hitchhikers, crossed the border between Canada and the United States in the early morning of October 5, 1971. At the time of the crossing Plaintiff Lee was sleeping while his friend drove. The automobile, a 1966 Volkswagen Van, was owned by Plaintiff Lee.

The Van crossed at Alburg Springs at a time when the customs station was closed. After proceeding some distance beyond the station, the Van was stopped by a customs agent who demanded to know why it had not proceeded to the customs station at Highgate, Vermont. The driver and Plaintiff Lee indicated that the van was low on gas and would probably need a refill to reach Highgate. The driver indicated that they were going to obtain gas at his father's house in Alburg.

At the agent's direction, the Van was driven to the Swanton Immigration station. The Van was searched and Plaintiff detained. He was subsequently told that the search uncovered a Japanese camera and tape deck and a gram of marijuana with two small clip scales.

Plaintiff and the other passengers were allowed to leave but the Van was seized. During the following day, Plaintiff contacted Defendant, Thornton, and was told he could secure the release of the Van only by posting a cash deposit of $1800. Plaintiff was also advised of his right to petition for remission and mitigation of penalties and forfeitures. He was unable to afford the cash deposit demanded.

3/The facts bearing on Plaintiff Lee are contained in the Amended Stipulation, See Lee Appendix at A-22.

On October 18, 1971, defendant Thornton wrote plaintiff advising him that he was charged with violating 19 U.S.C. § 1459 and 1595a and 21 U.S.C. § 881, and further that he had incurred a personal penalty of $1845 and his vehicle and its contents were forfeited.

On October 27, 1971, plaintiff submitted a petition for mitigation and remission. On November 1, 1971, he was advised that personal penalties were waived and the forfeitures were remitted to $100. He was unable to pay for a $250 bond that would have been required under 19 U.S.C. § 1608 to obtain a hearing. As a result, he paid the remitted penalty and received his personal property back.

Plaintiff was never afforded a hearing at any time on whether he had violated the customs laws, on whether his property was subject to forfeiture, on the amount of penalties or the extent of remission or mitigation. He was never charged with any criminal offense.

E. Statutory Scheme

Because the statutes, and implementing regulations, are somewhat complex. the following description of the statutory scheme is provided. The most important statutes - 19 U.S.C. §§ 1459, 1460, 1595a and 1608; 21 U.S.C. § 881 - are reproduced as an Appendix to this brief.

There are numerous forfeiture and civil penalty provisions in the customs law - of which, only a small part are relevant to this case. 19 U.S.C. § 1459 makes it unlawful to enter the United States by vehicle without declaring the merchandise brought in or reporting the driver and passengers for inspection.

19 U.S.C. § 1460 implements § 1459. It provides a $100 penalty on the driver, and a $500 penalty for each passenger, for not reporting for inspection. Further, vehicles bringing in undeclared merchandise are subject to forfeiture along with the merchandise. Additionally, the driver is liable for a penalty equal to the value of the undeclared merchandise. See also 19 U.S.C. § 1595a.

While no statute authorizes forfeiture where no merchandise is imported, 19 U.S.C. § 1594 authorizes holding the vehicle as security for the personal penalty. See also 19 C.F.R. § 162.22(d).

The statutes specify in some detail the procedures to be followed where vehicles and merchandise are seized under forfeiture provisions.[4/] Written notice of any penalty and the right to petition for remission or mitigation is given to each interested party. See 19 C.F.R. § 162.31(a). Each interested party can petition for remission or mitigation within 60 days; the petition may be granted if the appropriate customs officials finds no willful negligence or intent to defraud or finds mitigating circumstances. See 19 U.S.C. § 1618. Cancellation of the penalty or forfeiture can be granted on a finding that the act or omission forming the basis for the penalty or forfeiture did not occur. See 19 C.F.R. §§ 171.21, 171.31.

Seized property is appraised to determine the next step in the forfeiture process. Property worth $2500 or less is simply disposed of, after notice, without hearing unless an interested party puts up a $250 surety bond to cover the government's costs and expenses in obtaining condemnation. See 19 U.S.C. § 1608.

4/The application of all but the mitigation and remission provisions to personal penalties, where no merchandise is imported, is disputed and considered in the argument, infra/

If a bond is filed, the United States Attorney must file a forfeiture proceeding, in which the owner or interested party has the burden of proof, to determine whether forfeiture should occur. If the property is valued over $2500, the government must institute a forfeiture proceeding to retain the property; no bond is required. See 19 U.S.C. § 1604.

III. ARGUMENT

A. Plaintiff, James P. Lee

1. Plaintiff, James P. Lee, Has Been Denied Due Process Of Law By Virtue Of The Bond Prerequisite To Obtaining A Hearing.

The record in this action reflects that Plaintiff, James Lee, was effectively denied the opportunity to challenge the seizure of his vehicle because of the $250 bond requirement imposed by 19 U.S.C. § 1608.[5/] That statute provides:

> Any person claiming . . . vehicle, merchandise or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond . . . to the United States Attorney . . . who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

5/See Opinion and Order of July 25, 1975, Lee Appendix at A-97; Affidavit of James Lee, Lee Appendix at A-15, A-46.

19 U.S.C. § 1608. This provision is the exclusive method of obtaining a hearing on the validity of the seizure of property worth less than $2500. The court proceeding may be initiated only by the United States Attorney; the person whose property is held may not begin judicial proceedings to determine the validity of the seizure or trigger any administrative hearing process.

The federal courts have consistently held that "[t]he fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). See also, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Usually, notice and opportunity to be heard must proceed a governmental taking of a "property interest." See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970). However, because of the unique governmental interests in border seizures - pursuant to forfeiture statutes - notice and hearing in such a case may be delayed until after the actual deprivation of possession. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).[6/]

These principles are not seriously disputed. What is disputed is their application in light of 19 U.S.C. § 1608 as to an indigent who can not afford the $250 cost bond and is effectively denied an opportunity for a hearing. Only once in the past has any court considered the constitutionality of the bond requirement and then only in the context of a person with sufficient means to secure a bond. See Colacicco v. United States, 143 F.2d 410 (2d

6/Originally, plaintiffs contested the timing of notice and hearing in both cases. Much of the decision of the three-judge court was on this issue. In view of Calero-Toledo, plaintiff Lee, but not plaintiff Rich, has abandoned his claim for a prior hearing. Also, both plaintiffs have abandoned their claims for the rights of the criminally accused in light of Calero-Toledo.

Calero-Toledo does, however, recognize that due process requires a hearing at some point, and it is the unavailability of such a post-seizure hearing that is in issue.

1944). In upholding the statute in that case, this court specifically reserved decision on whether it would be constitutional as to an indigent. See Id. at 412.[7/]

Whether viewed as a question of due process of law or equal protection of the laws, wealth discrimination has been viewed by the courts with disfavor in many contexts. See Boddie v. Connecticut, 401 U.S. 371 (1971); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).[8/] Wealth barriers are particularly invidious where they present access to constitutionally required hearings. See Boddie v. Connecticut, supra. While accepting the thrust of these and other holdings, the lower court found that they were inapplicable in view of the more recent Supreme Court holdings in Ortwein v. Schwab, 410 U.S. 656 (1973); United States v. Kras, 409 U.S. 434 (1973).

Kras involved a constitutional assault on the filing fee requirement in bankruptcy. The Court found that the filing fee did not deny due process to an indigent because (a) the judicial process did not have a monopoly on resolving petitioner's disputes; (b) there is no fundamental right connected with bankruptcy; (c) the petitioner had other alternatives than bankruptcy, (d) there is no constitutional right to a bankruptcy; (e) a rational basis for the fee is found in the desire to keep the bankruptcy system

7/See also, Fell v. Armour, 355 F. Supp. 1319 (M.D. Tenn. 1972), discussed infra, involving a similar statute.

8/Because Defendants are federal officials, the plaintiffs claim the protection of the 5th Amendment. The equal protection requirement has been read into the 5th Amendment. See Frontiero v. Richardson, 411 U.S. 677 (1973).

self-sustaining; and (f) petitioner could pay his fee in installments over time.[9/]

Ortwein involved the validity of a filing fee requirement for judicial review of administrative action by the welfare department following an administative hearing. The Court noted the parallels to Kras in that the interest in welfare benefits does not have constitutional significance, there is no constitutional right to an appeal and filing fees help to defray the costs of the Court system.

There is a fundamental distinction between this case and Kras and Ortwein. In both those cases the process sought - a bankruptcy hearing and an appeal - were not constitutionally required; congress or the state legislature could deny such process to all. In both cases, the Court emphasized this fact numerous times. In this case, however, the process sought - a hearing prior to a final and permanent deprivation of property - is constitutionally required; Congress can not authorize the taking of citizens' automobiles without a hearing at some time. See e.g., Bell v. Burson, 402 U.S. 535 (1971). Thus, like Boddie and unlike Kras and Ortwein, this case involves a fundamental constitutional right, requiring something akin to a compelling federal interest to deny that right to indigents.[10/]

9/The Court clearly did not intend to make these factors the exclusive method of determining wealth barrier cases. Following a procedure the Court further developed in San Antonia Independent School District v. Rodriguez, 411 U.S. 1 (1973), Justice Blackman was distinguishing Boddie and refusing to extend it to bankruptcy.

10/The Court in Ortwein went to some length to distinguish the type of situation present here. Plaintiffs in Ortwein claimed that while they received hearings, the hearings did not comply with due process and thus argued that the judicial proceeding was constitutionally required. The Court dismissed this argument by stating that the record did not show defects in the hearings. See 410 U.S. at 659n.4

There are other distinctions between this case and Kras and Ortwein. Only through a hearing can plaintiff have adjudicated whether he violated the relevant customs laws and gain the return of his vehicle without penalty. Whereas, the plaintiffs in Kras and Ortwein sought a benefit through the judicial process, plaintiff here seeks to retain his personal possessions against unlawful seizure.

It is also relevant to note that forfeitures are quasi-criminal proceedings, involving at least part of the safeguards normally available only in the criminal process. See, e.g., One Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) (unreasonable search and seizure); United States v. U.S. Coin & Currency, 401 U.S. 715 (1971) (self-incrimination). The Courts have been particularly aggresive to eliminate wealth barriers in the criminal process because of the fundamental individual interests involved. See Gardner v. California, 393 U.S. 367 (1969); Long v. District Court of Iowa, 385 U.S. 192 (1966); Douglas v. California, 372 U.S. 353 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Griffin v. Illinois, 351 U.S. 12 (1956). See also Rinaldi v. Yeager, 384 U.S. 305 (1966).

It is also relevant that this case involves something more than a wealth barrier, met by others, but insurmountable to the poor. In fact, the barrier is itself wealth based, in the sense that only forfeiture of property of fairly small value raises the bond requirement. A poor person is unlikely to have an automobile worth more than $2500; a wealthy person is unlikely to have

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a vehicle worth less than $2500.[11/]

Only two justifications have been advanced for the bond requirement of 42 U.S.C. § 1608. The first is that the bond requirement prevents frivolous claims. See Lee v. Thornton, 370 F. Supp. 312, 322 (D. Vt. 1974). That justification is clearly inappropriate in view of Lindsey v. Normet, 405 U.S. 56 (1972). There, the Court was faced with the constitutional validity of a statute requiring a tenant to post a "double rent bond" as a prerequisite to an appeal. In rejecting the argument that the bond acts to screen out frivolous appeals, the Court stated:

> The claim that the double bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars non-frivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond.

405 U.S. at 78. It is clear that the holding and rationale of Lindsay apply with equal force in this case.[12/]

11/The Supreme Court has noted that the wealth of the individual may, in itself, be determinative of due process mandates. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court required administrative hearings prior to termination of welfare benefits noting that termination deprives the recipient of the only means to subsist while challenging the determination. Deprivation of an automobile could have a similar effect.

12/As is expectable, Lindsey spawned a number of cases striking down bond requirements on wealth discrimination. See e.g., Beaudreau v. Superior Court of Los Angeles, 121 Cal Rptr 585, 535 P.2d 713 (1975); Harrington v. Harrington, 269 A.2d 310 (Me. 1970).

The second rationale advanced is to insure that the Government recovers the expense of condemnation proceedings should it prevail. Assuming the validity of this rationale, the statute is overbroad in accomplishing its objective. Instead of requiring the bond for all property worth less than $250, and incapable of producing the statutorily determined allotment for costs and expenses, the statute requires a bond for all property worth $2500 or less even though that property may be worth more than the expenses and fees.

Plaintiffs submit, however, that the justification is not valid in the context of a constitutionally required hearing to determine whether plaintiffs will be deprived of property by forfeiture. Thus, much more than bare rationality is required and the precedents in the criminal area are more relevant than others involving bankruptcy and welfare appeals. The situation is akin to that described in Griffin v. Illinois, 351 U.S. 12, 17 (1956):

> Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in Court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor.

Griffin and its progeny do not authorize balancing between governmental fiscal concerns and individual rights; they represent a "flat prohibition" against depriving indigents of constitutionally required due process hearings. See Mayer v. Chicago, 404 U.S. 189, 196-7 (1971).[13/]

In summary, plaintiffs urge this Court to accept the analysis of an identical state statute in Fell v. Armour, 355 F. Supp. 1319, 1333 (M.D. Tenn. 1972) (three-judge Court):

> The $250 cost bond of the Act allows one sufficiently affluent to obtain a hearing whereby he may seek recovery of his vehicle and avoid the harsh penalty of forfeiture. Those owners of seized vehicles who cannot afford the cost bond have their rights to seek recovery of the vehicle and thereby avoid the harsh penalty of forfeiture extinguished by their personal poverty. As to these indigent owners, the effect of the $250 cost bond requirement is to grant to the seizing police officer the effective right to extinguish all property interests. As to those too poor to afford a hearing, this exercise of raw power can only lead to arbitrary

13/It is relevant that the Government's fiscal justification is only valid for small value merchandise where the Government stands to gain little financially. In such cases, the forfeiture deprives the individual of something of value to him but of little value to the Government; for example, an older model vehicle used to gain a livelihood. Where the punitive effect high, and the compensatory effect slight, the parallel to the criminal process is apparent. The lower court heavily relied on the need to allow such punitive forfeitures to reach its decision. see Lee Appendix at A-97.

> state action in that no neutral hearing officer or judicial official will have the opportunity to review the evidence and determine the priority of the forfeiture or the claim for recovery. Thus, the indigent owner may be deprived of property without due process of law in that the deprivation may occur without any process whatsoever.

For these reasons, plaintiff submits that he is denied due process of law by the unavailability of any hearing to contest the validity of the seizure of his vehicle.[14/]

B. Plaintiff, Ronald Rich

1. Plaintiff, Ronald Rich, has been denied due process of law because of the unavailability of a hearing, prior to seizure, at which he could contest the grounds for assessment of penalties and seizure of his vehicle.[15/]

14/This is not a case where the hearing would be unavailing because the stipulated facts clearly show the Government's right to forfeiture. Compare United States v. One 1969 Buick Rivera Automobile, 493 F.2d 553 (5th Cir. 1974). Plaintiff Lee was alleged to have violated 19 U.S.C. § 1459 and 1595a and 21 U.S.C. § 881. 19 U.S.C. § 1459 imposes the duty to report to the nearest custom house and plaintiff alleges he was doing so. 19 U.S.C. § 1595a apparently requires importation which had not yet occurred in Lee's case because the van was apprehended before it got to the customs house cf. Keck v. United States, 172 U.S. 434 (1899). 21 U.S.C. § 881 requires either importation or that the marijuana be "manufactured, distributed, dispensed or acquired" presumably within the United States." Lee denies he comes within any of the components of § 881 and further denies that any controlled substance was in his vehicle. See Lee Appendix at A-38, A-39.

15/This point was not argued in the Supreme Court because defendants did not appeal. It was not argued in the District Court on remand because the District Court issued an opinion without any hearing or request for written argument.

Plaintiff, Rich, was assessed personal penalties under 19 U.S.C. § 1460 for failing to report his arrival into the United States pursuant to 19 U.S.C. § 1459. Because the vehicle contained plaintiff, Rich, and three passengers he was assessed a penalty of $1600. See 19 U.S.C. § 1460.

The customs statutes do not authorize vehicle forfeiture for failure to report arrival unless the vehicle is carrying merchandise (Rich's automobile was not carrying merchandise). Pursuant to 19 U.S. § 1594, however, such vehicles shall be held "for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same . . . ." Implementing customs regulations indicate the vehicle is held until the penalty incurred has been settled. See 19 C.F.R. § 162.22(d). Although the forfeiture provisions do not apply, a libel may seek the vehicle unless it is "to be retained for official use." 19 C.F.R. § 162.42.[16/]

Relying primarily on Bell v. Burson, 402 U.S. 535 (1971), the three-judge court held that an immediate hearing on whether § 1460 was violated and on whether remission or mitigation pursuant to § 1618 as appropriate is required to fulfill due process of law. The court read this requirement into § 1594 to preserve its constitutionality. The court noted that such an immediate hearing would not require major changes in current custom office practice. The court summarized its holding by listing the requirements of the hearing before the appropriate customs officer - that is, one not involved in the apprehension or accusation as follows:

16/There is a substantial dispute as to the availability of forfeiture hearings under 19 U.S.C. §1608 to persons who are assessed only personal penalties. The three-judge court held that such hearings were available. See Lee Appendix at A-69, A-13. Plaintiff disputes this. However, the dispute is relevant only to the issues of a post-seizure hearing considered infra.

a) The accused will receive notice of the allegation against him;

b) The accused will be able to state his version;

c) The accused will be allowed to confront and question witnesses;

d) The official will make a "probable cause" determination;

e) The accused will be advised of the right to petition for remission or mitigation and be allowed to do so;

f) The official will exercise descretion in determining the maximum fine;

g) The accused will be allowed to post security for this amount to secure return of the vehicle; and

h) The officer will summarize the substance of the hearing and decision on appropriate forms.

See Lee Appendix at A-59.

After remand from the Supreme Court, the case was viewed differently by the single district judge. Relying on Calero-Toledo v. Pearson Yacht Leasing Co, 416 U.S. 663 (1974), the court held that a preseizure or immediate hearing was not required in a forfeiture situation. The court did not distinguish Rich's case, involving retention of the vehicle as security, from Lee's case, involving forfeiture, and apparently held Calero-Toledo covered both. Plaintiff Rich submits this holding is erroneous and that Calero-Toledo does not govern Rich's situation.

Calero-Toledo involved a proceeding under Puerto Rico law

to forfeit a yacht because it was transporting contraband. The lower court held that a pre-seizure hearing was constitutionally required under Fuentes v. Shevin, 407 U.S. 72 (1972) (replevin). The Supreme Court, however, emphasized the permissable exception to pre-seizure hearing outlined in Fuentes where: (1) the seizure is necessary to secure an important governmental or public interest; (2) there is a special need for prompt action; and (3) the state keeps strict control over its monopoly of force and an appropriate governmental official determines it is necessary and justified in the particular instance. The Court held that this three prong test was met because: (1) the seizure of a vessel carrying contraband serves significant governmental interests; (2) seizure allows the state to assert in rem jurisdiction for forfeiture and prevents further illicit use of property; (3) immediate action is necessary because the vessel can be removed to another jurisdiction if advance warning is given; and (4) the seizure is exclusively in the control of governmental officials. In summary, the Court held that forfeiture cases involved "extraordinary" situations where pre-seizure notice and hearing is unnecessary. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 679-80 (1974).

Plaintiff submits that the instant case - where the seizure is performed under 19 U.S.C. § 1594, solely to acquire a vehicle as security for a penalty - presents different considerations from those present in Calero-Toledo and is not governed by that case.

The central factor relied on in Calero-Toledo was the in rem nature of the forfeiture proceeding and the government's total interest in the property. This factor is obviously not present

where the government takes a vehicle solely as security for payment of alleged penalties and claims no right to the vehicle, per se. The significance of this distinction is apparent from two lines of cases that have treated aspects of due process after Fuentes.

The first line of cases deals with pre-judgment attachments of real or personal property at the initiation of a lawsuit. The Supreme Court has consistently struck down pre-judgment attachment statutes that do not give prior notice and hearing, or equivalent procedural protections including judicial intervention. See, e.g., North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975). In spite of the consistency, of this line of cases, it has been equally well recognized that pre-judgment attachment of the property of a non-resident necessary to confer in rem jurisdiction is an "extraordinary" situation and, for that reason, valid. See Lebowitz v. Forbes Leasing & Financing Corp., 456 F.2d 979 (3d Cir. 1972); U.S. Industries v. Gregg, 348 F. Supp. 1004 (D. Del. 1972); See Baker v. Gotz, 336 F. Supp. 197 (D. Del. 1971), aff'd, 492 F.2d 1238 (3d Cir. 1974); Tucker v. Burton, 319 F. Supp. 567 (D.D.C. 1970); Banks v. Superior Court, 26 Cal. App. 3d 143, 102 Cal. Rptr. 590 (1972);Gordon v. Michel, 297 A.2d 420 (Del. Ch. 1972). Thus, the necessity of the government to acquire in rem jurisdiction in the forfeiture situation is, in itself, a determinative factor, as prior cases indicate, that warrants dispensing with pre-seizure hearing. Its absence in the security seizure situation suggests a different outcome.

The second line of cases are those dealing with property, the title to which is not solely in the individual. In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the court narrowed the reach

of Fuentes in a replevin case where the vendor-creditor held a security interest. The Court noted:

> Plainly enough, this is not a case where the property sequestered by the Court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, pendente lite, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.

416 U.S. at 604. The forfeiture situation is one akin to Mitchell. The Government claims a total right to the seized property, exclusive of the individual; the individual claims the converse. The rights must be balanced. Where the government takes the property as security, however, the situation is markedly different. The Government claims no title in the property and has no pre-existing interest beyond the possessory interest necessary to insure payment of the penalty. This difference again suggests a different outcome.

Largely, these distinctions go to the nature of the governmental or public interest present, the first component of the Fuentes exception test. The governmental interest is much less

significant in a security situation than in a forfeiture case like Calero-Toledo. Plaintiff also submits that the nature of the offense is relevant to the governmental interest. In essence, Plaintiff Rich was charged with a technical offense under the customs law. Where he has violated no independent customs or immigration law - that is, has not imported dutiable merchandise or aliens - imposition of penalties is justifiable only as a mechanism to insure the inspection system will reach all entering vehicles. See Lee v. Thornton, Lee Appendix at A-65n.4. The fear of re-occurance and the need to deprive the individual of the instrumentalities of reoccurance, emphasized in Calero, is of insignificant weight.

Plaintiff also submits that the other two aspects of the Fuentes test are not met where a vehicle is seized for security. First, there is no special need for prompt action, at least in the case of a local resident. Second, the standards for use of pre-hearing seizure are not narrowly drawn and no discretion is involved. The District Court passed over these aspects with the broad assertion that the offender may conceal or destroy the property or easily remove it back across the border into Canada. Lee Appendix at A-94.

It is simply incredible to suggest that Plaintiff Rich, a resident of Vermont, would take a vehicle valued at $50 into Canada or conceal or destroy it to avoid paying a $1600 civil penalty. Even if he did, it would be unavailing since he would still be liable for the penalty and could be sued under 28 U.S.C. § 2461 for the penalty. At the same time, after hearing, the United

States could attach property of value more consistant with its claim.

The security statute, 19 U.S.C. § 1594, does not, however, allow for an independent examination of the circumstances as to whether concealment, destruction or flight is likely. It states that the vehicle "shall be held for the payment of such penalty . . . (emphasis supplied)". In that sense, it is neither narrowly drawn nor liberal enough to allow for discretion in its application.

In summary, plaintiff submits that Calero-Toledo does not apply to the seizure of plaintiff, Rich's, vehicle, that Fuentes does apply and that due process of law requires a pre-seizure hearing.

There remains only to be considered the approach originally adopted by the three-judge court. The court recognized that a preliminary hearing could be held cotemporaneous with the vehicle seizure without undue burden on the customs officials and that such a hearing would meet the due process objection. See, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972). Plaintiff has no objection to this method of resolving the constitutional difficulty but submits that one other consideration, not raised by the district court, must be assessed. That is, to satisfy the Fuentes exception, the customs officer must also determine the necessity of holding the vehicle as security in view of the likelihood that the individual will conceal, remove or destroy it.[17/]

17/The three judge district court read into the statute the necessity for the "probable cause" hearing and thus, avoided holding it unconstitutional. While it is irrelevant to the outcome of this action whether the statute is declared unconstitutional, plaintiff notes that the mandatory nature of § 1594 seems to prevent a reading that would ever allow realease of the vehicle.

In all other respects, plaintiffs urge this court to adopt the holding of the three-judge court on the question of pre-seizure hearing in Rich's case.

2. Plaintiff, Ronald Rich, has been denied due process of law because he has never been afforded a hearing at which he could contest whether he is liable for personal penalties under 19 U.S.C. § 1460 .

As the statement of facts indicates, plaintiff Rich was allowed to file an immediate request for remission and mitigation when his vehicle was seized. The value of the vehicle was determined to be $50 and it was released on the posting of this amount. Subsequently, he was informed by Defendant Thornton that the penalty was mitigated to $25 and this amount was taken from the deposit. Plaintiff Rich was never afforded a hearing on whether he violated 19 U.S.C. § 1459 or on the extent of the mitigation of penalties and, as indicated below, none was available to him.

The three-judge court that originally heard this action held that the "probable cause" hearing that it mandated fulfilled all due process requirements without the necessity for any further hearings Alternatively, it decided that the judicial forfeiture hearings, authorized by 19 U.S.C. §§ 1607, 1608, were available to Rich and fulfilled the requirements of due process. See Lee Appendix at A-59, A-60. The single District Judge, after holding that Calero-Toledo obviated the need for the probable cause hearing, implicitly held that the forfeiture process was available to Rich and fulfilled due process. See Lee Appendix at A-95. Plaintiff submits these holdings are erroneous.

The pre-seizure hearing adopted by the three-judge court and urged above fulfills a narrow and limited purpose. In it, the customs official is required to determine only "whether there is reasonable ground to believe that § 1459 was violated by the accused." See Lee Appendix at A-59. The official does not have to determine whether in fact § 1459 was violated. A probable cause hearing is not a substitute for a constitutionally mandated full hearing and does not itself fulfill due process. As noted by the Supreme Court in Morrissey v. Brewer, 408 U.S. 471 (1972), in the context of parole revocation proceedings:

> There must also be an opportunity for a hearing, if it is desired by the parolee, prior to the final decision on revocation by the parole authority. This hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.

408 U.S. at 487-88. The application of Morrissey to the instant case is apparent. The probable cause hearing does not, itself, fulfill due process.

There remains to be considered only the alternative grounds used by the lower court - that the forfeiture statutes

provide the hearing. If this were true, plaintiff submits the bond requirement represents an impermissable barrier to a hearing for Rich, an indigent. This argument has been fully explored above and will not be reiterated here.

Plaintiff also submits, however, that the District Court was erroneous in holding that the forfeiture hearings under 19 U.S.C. § 1608 applied also to personal penalties, where a vehicle is held as security. While the statutes relating to procedures after seizure do not specifically limit their applicability to forfeitures, it is apparent from a reading of specific sections that that is their intent. For example, in cases of vehicles worth $2500 or less, § 1607 requires the collector of customs to publish notice of the seizure. Pursuant to § 1608, any person holding an interest is then required to put up a $250 cost bond to force a hearing. If no bond is filed, the customs officer must "declare the . . . vehicle . . . forfeited", sell the vehicle and deposit the proceeds in the U.S. Treasury. 19 U.S.C. § 1609. This procedure is mandatory, yet it can have no applicability to a vehicle that is being held only as security and can not be forfeitted at all.[18/]

The relevant customs regulations adopt the view that the forfeiture procedures have no applicability to vehicles held solely as security. 19 C.F.R. § 162.42 provides:

18/There is one other possibility; that is the Congress intended that property held as security be forfeited if the penalty is unpaid. That possibility raises serious constitutional questions, however, since an indigent could lose a vehicle valued in excess of the penalty simply because he couldn't pay the penalty. Compare Tate v. Short, 401 U.S. 395 (1971).

> If seizure is made under a statute which provides that the property may be seized and proceeded against by libel, the summary forfeiture procedures set forth in §§ 162.45, 162.46 and 162.47 do not apply.[19/]

The forfeiture procedures referenced in the text are the regulations implementing 19 U.S.C. § 1602 et seq. including those covering procedures for forfeiting property worth $2500 or less. Compare 19 U.S.C. § 1608.

Given that 19 U.S.C. § 1608 does not apply to Rich's case, it is impossible to find an alternative that does apply. There are no administrative hearings. The sole possible judicial hearing is an action under 28 U.S.C. § 2461(a) to recover the penalty.[20/] This hearing is only available on the filing of a complaint by the U.S. Attorney and there is no duty on him to do so under either 19 U.S.C. § 1594 or 28 U.S.C. § 2461(a). Indeed, the regulations suggest the customs service may simply keep the vehicle forever "for official use". See 19 C.F.R. § 162.42. Rich was never notified of the availability of a hearing through 28 U.S.C. § 2461(a). In fact, the mitigated fine was simply deducted from his deposit without his consent and retained by defendant.

19/The three-judge court noted that the Government disagreed with the contention that § 1608 was inapplicable to vehicles seized as security. How it arrived at this conclusion is unclear. It did not consider the above quoted regulation. See Lee Appendix at A-69n.13.

20/A reading of 28 U.S.C. § 2461 together with 19 U.S.C. § 1594 suggests that the "libel" referenced by § 1594 is the libel authorized by 28 U.S.C. § 2461(b) for seizures on the high seas or navigable waters. In view of this, it is likely that 28 U.S.C. § 2461 is the only intended method for enforcing personal penalties.

In summary, plaintiff Rich submits that he was denied due process of law by being assessed personal penalties for alleged violation of 19 U.S.C. § 1459 without any hearing to contest the assessment.[21/]

C. Relief

1. Both Plaintiffs Are Entitled To Declaratory Relief

The District Court recognized that this case was in a sufficient adversary posture to warrant declaratory relief although the need for an injunction has been obviated by the return of plaintiffs' vehicles. Both parties still seek return of the penalties they paid Compare Super Tire Engineering Co. V. McCorkle, 416 U.S. 115 (1974).

The lower court did not issue a declaratory judgment, however, because it found no invasion of plaintiffs rights. As argued supra, both Plaintiffs' rights were invaded by the taking of penalties, and seizure of their vehicles, without due process of law. Plaintiffs urge this court to remand for issuance of appropriate declaratory judgments.

2. Plaintiffs Should Be Awarded The Return Of Penalties Assessed Against Them.

Plaintiffs have continuously sought the return of the penalties they paid through this action. As the lower court re-

21/While it is not strictly speaking relevant to the constitutional question involved, it is appropriate to note that plaintiff has more than a colorable claim that he never violated 19 U.S.C. § 1459. That section required him to report to the nearest custom house. Since he crossed on a road without a custom house and was arrested near the border, it is not clear that he was in noncompliance with that section. See Rich Appendix at A-14, A-18.

cognized, the Tucker Act, 28 U.S.C. § 1346(a)(2), gives the federal courts jurisdiction to hear claims for money damages including fines or penalties paid, based on claims that seizures were made unlawfully or penalties unlawfully assessed.[22/] See Simons v. United States, 497 F.2d 1046 (9th Cir. 1974); Pasha v. United States, 484 F.2d 630 (7th Cir. 1973); Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3d Cir. 1972); United States v. Compagnie Generale Transatlantique, 26 F.2d 195 (2d Cir. 1928); Jaekel v. United States, 304 F. Supp. 993, 997 (S.D.N.Y. 1969).

The single District Judge declined to order repayment of plaintiffs' penalties because he found no violation of their rights. The three-judge court did find a violation of rights but refused to award repayment. The opinion suggests that repayment could be ordered only through the "court's equitable power to fashion appropriate relief", essentially in review of the discretionary determination to mitigate or remit under 19 U.S.C. 1618. Looking at the totality of the cir cumstances, the court determined that it would not order remission of the penalties. However, it did remand to the single judge to determine consequential damages. See Lee Appendix at A-64.

Plaintiffs submit that the lower court misconstrued the nature of relief sought. Return of the penalties paid is in the nature of damages under the Tucker Act and does not involve the

22/In view of 28 U.S.C. § 2680(e), plaintiffs withdrew their request for consequential damages. They did not withdraw their request for damages in the amount of the fine paid.

exercise of the court's equitable power. See Simons v. United States , 497 F.2d 1046 (9th Cir. 1974). Return should be awarded as a matter of course on a finding that the penalty was unlawfully collected. See Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3d Cir. 1972).

To a certain extent, it appears that the lower court's confusion resulted from the fact that the plaintiffs' penalties had been mitigated and their vehicles returned. Plaintiffs have not sought, as the lower court suggested, review of the remission or mitigation decisions of defendant. Plaintiffs arree that the law indicates that such decisions are discretionary and generally unreviewable. See Bramble v. Richardson, 498 F.2d 968 (10th Cir. 1974).

Plaintiffs urge they are entitled to return of their penalties, even though they have been mitigated, based on the denial of due process in the assessment process. The extent of the coercive power wielded by agencies with authority to mitigate or remit penalties and forfeitures has been documented elsewhere. See K. Davis, I Administrative Law Treatise § 4.05 (West 1958). The effect in this case was obvious. Plaintiff Lee either paid a remitted penalty or he lost his vehicle permanently, without any hearing, because he couldn't provide the cost bond - his desire for a hearing on whether he committed any illegal act was simply overweighed by his need to keep his vehicle. Plaintiff Rich could obtain no hearing of any kind, he put up a deposit to retain his vehicle, and the mitigated penalty was taken from the deposit without his consent.

Numerous precedents have held that persons who pay penalties, under the governmental coercion of the losing of immediate benefits by contesting, may recover back their penalties if they were found to be unlawfully assessed. See, e.g., South Puerto Rico Sugar Co. v. United States, 334 F.2d 622 (Ct. Cl. 1964); Sinclair Nav. Co. v. United States, 32 F.2d 90 (5th Cir. 1929); United States v. Compagnie Generale Transatlantique, 26 F.2d 195 (2d Cir. 1928). See also Pasha v. United States, 484 F.2d 530 (7th Cir. 1973) (plea of nollo to statute subsequently declared invalid does not prevent defendant from recovering fine paid).

Thus, the granting of a petition for remission or mitigation under circumstances like those present in the instant case does not indicate a waiver by plaintiffs of their rights to insist on due process in assessment and to demand return of the remitted or mitigated penalties because due process is not received. See Ramsey v. United States, 329 F.2d 432 (9th Cir. 1964); Jaekel v. United States, 304 F. Supp. 993 (S.D.N.Y 1969). This case is particularly appropriate for return of penalties because plaintiffs were confronted with a situation where then could not contest the penalties assessed against them because of the unconstitutional denial of any opportunity to be heard.

The only way to make plaintiffs whole in this case is to order return of the penalties. If Defendants then desire to further pursue penalties against plaintiffs, they will have to afford plaintiffs an opportunity to contest the assessment as plaintiffs have desired See n.14 & 21 supra for the possible issues in such hearings. If, after plaintiffs are afforded due process of law, it is shown that they have violated the relevant customs laws, the Defendants can reassess and collect appropriate penalties or forfeitures.

IV. CONCLUSION

For the reasons stated in Part III (A), and III (c) above, Appellant, James Lee, urges this court to reverse the lower court's order of July 25, 1975 dismissing Appellant's complaint in this action and direct that the Declaratory Judgment and judgment for the penalty assessed against Appellant be entered.

For the reasons stated in Parts III (B) and III (c) above, Appellant, Ronald Rich, urges this court to reverse the lower court's order of July 25, 1975 dismissing Appellant's complaint in this action and direct that the Declaratory Judgment and judgment for the penalty assessed against Appellant be entered.

Dated: October 31, 1975

Respectfully submitted,

John A. Dooley III

JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
150 Cherry Street - Box 562
Burlington, Vermont 05401

COUNSEL FOR PLAINTIFFS-
S APPELLANTS

APPENDIX

UNITED STATES CODE

19 U.S.C. 1459. Contiguous countries; report and manifest

The master of any vessel of less than five net tons carrying merchandise and the person in charge of any vehicle arriving in the United States from contiguous country, shall immediately report his arrival to the customs officer at the port of entry or customhouse which shall be nearest to the place at which such vewsel or vehicle shall cross the boundary line or shall enter the territorial waters of the United States, and if such vessel or vehicle have on board any merchandise, shall produce to such customs officer a manifest as required by law, and no such vessel or vehicle shall proceed farther in land nor shall discharge or land any merchandise, passengers, or baggage without receiving a permit therefor from such customs officer. Any person importing or bringing merchandise into the United States from a contiguous country otherwise than in a vessel or vehicle shall immediately report his arrival to the customs officer at the port of entry or customhouse which shall be nearest to the place at which he shall cross the boundary line and shall present such merchandise to such customs officer for inspection.

19 U.S.C. 1460. Same; penalties for Failure to report or file manifest

The master of any vessel or the person in charge of any vehicle who fails to report arrival in the United States as required by section 1459 of this title, or if so reporting proceeds further inland without a permit from the proper customs officer, shall be subject to a penalty of $100 for each offense. If any merchandise is imported or brought into the United States in any vessel or vehicle, or by any person otherwise than in a vessel or vehicle, from a contiguous country, which vessel, vehicle, or merchandise is not so reported to the proper customs officers; or if the master of such vessel or the person in charge of such vehicle fails to file a manifest for the merchandise carried therein, or discharges or lands such merchandise without a permit; such merchandise and the vessel or vehicle, if any, in which it was imported or brought into the United States shall be subject to forfeiture; and the master of such vessel or the person in charge of such vehicle, or the person importing or bringing in merchandise otherwise than in a vessel or vehicle, shall, in addition to any other penalty, be liable to a penalty equal to the value of the merchandise which was not reported, or not included in the manifest, or which was discharged or landed without a permit. If any vessel or vehicle not so reported carries any passenger; or if any passenger is discharged or landed from any such vessel or vehicle before it is so reported, or after such report but without a permit, the master

of the vessel or the person in charge of the vehicle shall, in addition to any other penalty, be liable to a penalty of $500 for each passenger so carried, discharged, or landed.

19 U.S.C. § 1595a. Forfeitures; Penalty for Aiding Unlawful Importation

(a) Except as specified in the proviso to section 1594 of this title, every vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any other way, the importation, bringing in, unlading, landing, removal, concealing, harboring, or subsequent transportation of any article which is being or has been introduced, or attempted to be introduced, into the United States contrary to law, whether upon such vessel, vehicle, animal, aircraft, or other thing or otherwise, shall be seized and forfeited together with its tackle, apparel, furniture, harness, or equipment.

(b) Every person who directs, assists financially or otherwise, or is any way concerned in any unlawful activity mentioned in the preceding subsection shall be liable to a penalty equal to the value of the article or articles introduced or attempted to be introduced.

19 U.S.C. § 1608. Same; Claims; Judicial Condemnation

Any person claiming such vessel, vehicle, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

21 U.S.C. § 881. Forfeitures - Property Subject

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) and (2), except that -

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter 11 of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owrer in violation of the criminal laws of the United States, or of any State.

(5) All books, records and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES P. LEE, JR.,
Plaintiff-Appellant

vs.

No. 6762

WILLIAM L. THORNTON, ETC., ET AL.,
Defendants-Appellees

RONALD RICH,
Plaintiff-Appellant

vs.

WILLIAM L. THORNTON, ETC., ET AL.,
Defendants-Appellees

CERTIFICATE OF SERVICE

Now comes, John A. Dooley, III, counsel for Plaintiffs-Appellants, and certifies that he has served the Brief of Appellants, Appendix for Ronald Rich, and Appendix for James P. Lee, by mailing two copies by first class mail, postage prepaid, to William Gray, Assistant United States Attorney, counsel for Defendants-Appellees at his last known address, Federal Building, Rutland, Vermont 05701 this 30th day of October, 1975.

JOHN A. DOOLEY,
Vermont Legal Aid, Inc.
150 Cherry Street, Box 562
Burlington, Vermont 05401

COUNSEL FOR PLAINTIFFS-
APPELLANTS